

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THEROPHIS COLE)	
Claimant)	
VS.)	
)	Docket No. 1,064,503
WALMART)	
Respondent)	
AND)	
)	
NEW HAMPSHIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 12, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Leah B. Burkhead, of Mission, Kansas, appeared for the claimant. Michael R. Kauphusman, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the June 12, 2013, Preliminary Hearing with exhibits attached and the documents of record filed with the Division of Workers Compensation.

ISSUES

The ALJ found that claimant failed to prove by a preponderance of the evidence that he reported the work injury to a supervisor or manager by December 21, 2012, making claimant's notice to respondent untimely. Therefore, pursuant to K.S.A. 2012 Supp. 44-520, proceedings for compensation under the Kansas Workers Compensation Act (Act) shall not be maintainable, and claimant's request for medical treatment was denied.

The claimant appeals, arguing that the preponderance of the evidence proves that he met his burden in showing that he provided proper notice of his November 21, 2012, work injury in accordance with K.S.A. 44-520. Claimant contends he discussed the accident and resulting left knee trauma with his supervisor on December 5, 2012. In the alternative, claimant argues he sustained a repetitive work injury in accordance with K.S.A. 2012 Supp. 44-508(e), which would provide that the earliest day of accident could possibly be April 10, 2013, thus rendering the notice given January 25, 2013, when the Associate Incident Report was completed, timely.¹ Claimant argues the Order should be reversed and the matter remanded back to the ALJ with directions to order an authorized treating physician pursuant to the recommendations of Dr. Parmar and for any other relief deemed proper.

Respondent argues that the Order should be affirmed.

The issues are as follows:

1. Did claimant provide timely notice of his alleged accident?
2. What is the appropriate date of accident?

FINDINGS OF FACT

Claimant had been employed by respondent for 15 years. In November, 2012, he was working as a maintenance custodian. His job duties did not require it, but he regularly assisted in moving pallets of products into the store whenever a new truck would arrive. This task necessitated claimant use a pallet hand jack and move products stacked on pallets. On November 21, 2012, claimant was moving pallets of plastic water bottles when he felt a snap in his left knee accompanied by a sharp pain. Claimant sat down for a short time and then completed his task of moving the pallets. At his discovery deposition, claimant testified that he did not mention the injury to anyone at that time, although he was aware of respondent's policy requiring the reporting of injuries when they happened. Claimant acknowledged that he had suffered two prior injuries, one to his back and one to his right wrist resulting in a carpal tunnel syndrome claim. He testified that he thought the injury to his knee was mild. But he agreed the next day the knee hurt more.

Claimant sought medical treatment on December 5, 2012, when he went to his personal physician, Steven Rettinger, M.D., at the Shawnee Mission Medical Center. The December 5, 2012, history indicated a work-related accident two weeks before the examination, with a date of accident on November 21, 2012. Claimant provided a copy of the restrictions to Angel, the secretary with respondent's human resources department, who handles all the paperwork. Claimant advised Angel that his left knee injury was work

¹ P.H. Trans., Resp. Ex. F.

related. The restriction from Dr. Rettinger prohibited claimant from doing truck preparation. However, between November 21 and December 5, 2012, claimant performed his regular duties for respondent. It is unclear whether this included helping with the truck preparation work.

Claimant was examined by Chad A. Winters, D.O., of Shawnee Mission Primary Care on January 14, 2013. Claimant's knee had continued to get worse and he was still doing his regular job. It appears, as of December 5, 2012, claimant was not helping with the truck preparation work.

Claimant returned to the Shawnee Mission Medical Center on January 14, 2013, at which time he underwent x-rays of the left knee. An MRI of the knee was also performed on January 21, 2013. A tear in the posterior horn of the medial meniscus was diagnosed. Claimant was given a slip taking him off work on January 14, 2013. This was the first time a physician advised claimant that his knee injury was work-related.

At his discovery deposition, claimant was asked if he advised anyone with respondent of the accident, between his conversation with Angel and his examination with Dr. Winters. Claimant testified about a conversation with an Assistant Manager, Robert, after his examination with Dr. Winters. He also had conversations with Assistant Manager Bonnie, but could not state when those talks occurred. Claimant testified he filled out the Associate Incident Report on the day he spoke to Bonnie. That report was dated January 25, 2013, and indicated a date of accident on December 5, 2012. Claimant acknowledged this may also have been the first day he spoke to Robert about the accident. However, he was unclear on the exact dates of those conversations as well. Claimant later testified at the preliminary hearing that he advised Marti, his supervisor, of the knee injury and the fact it was work-related. This conversation supposedly took place on December 5, 2012. The December 5, 2012, medical note restricted claimant from performing truck preparation. However, on cross-examination claimant testified he first reported the accident on the date he filled out the Associate Incident Report, which was January 25, 2013. Immediately after the Incident Report was completed, respondent began providing claimant with medical treatment.

Angela (Angel) Grudniewski testified at the time of the preliminary hearing. She is the personnel coordinator for respondent. Her duties included taking care of the personnel aspect of the job, benefits, hiring and training. Ms. Grudniewski testified respondent posted the required workers compensation notices explaining what was required to pursue a workers compensation claim. She would normally receive five to ten work slips per week from doctors offices. Ms. Grudniewski denied receiving any information from claimant on December 5, 2012, that his knee problem was related to his job with respondent. Ms. Grudniewski testified that if claimant had told her, he would have been instructed to speak to a member of management. When she noticed the slip restricted claimant from setting up for the trucks, Ms. Grudniewski advised claimant that was not part of his regular duties and he didn't need to do that anyway.

Claimant brought in a second slip, dated January 15, 2013, indicating the need to file a workers compensation claim. He was advised to speak to a member of management at that time. Ms. Grudniewski testified she is not a member of management. She is an hourly associate, while management is salaried. She admitted that claimant told her his knee condition was work-related when he brought the January 15, 2013, note, but not with the December 5, 2012, note.

Claimant continued receiving medical treatment with the Shawnee Mission Medical Center and Primary Care. The medical reports indicate an injury on November 21, 2012, with ongoing complaints. Claimant was referred by his attorney to orthopedic surgeon Prem Parmar, M.D., on April 10, 2013. Dr. Parmar noted the injury to claimant, finding it stemmed from the November 21, 2012, incident. In his letter of June 11, 2013, Dr. Parmar opined the prevailing factor of claimant's current complaints and need for treatment is the work-related injury on November 21, 2012.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant suffered personal injury by accident on November 21, 2012. The evidence supports a finding that claimant's injury was traumatic, and not repetitive. What is more seriously contested is whether claimant provided timely notice of that accident. Claimant first testified that he told Angel, Robert and Bonnie of the accident on or about December 5, 2012. He later testified that he told either Robert or Bonnie or both of the accident on the date he filled out the Associate Incident Report on January 25, 2013. Claimant also altered his discovery deposition testimony at the preliminary hearing with the addition of Marti's name. But again, claimant testified on cross examination that the first time he notified respondent of the accident was when the Incident Report was completed.

Claimant's allegation that he told Marti of the accident on December 5, 2012, is not credible. In fact, claimant's testimony regarding when and to whom he provided notice is regularly contradicted by claimant's own testimony, and equally incredible. Claimant has failed to prove, by a preponderance of the credible evidence, that he satisfied the requirements of K.S.A. 2012 Supp. 44-520. Notice has not been timely provided. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove that he provided timely notice of his accident. The statutory requirements of K.S.A. 2012 Supp. 44-520 have not been satisfied.

² K.S.A. 2012 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 12, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Leah B. Burkhead, Attorney for Claimant
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Kenneth J. Hursh, Administrative Law Judge